



ABAC Adjudication Panel Determination No 195/23

Product: Grog Lemon Ice, Grog Peach and Grog Grape
Company: Grog Drinks Pty Ltd
Media: Packaging and Website
Date of decision: 15 January 2024
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Professor Richard Mattick
Ms Debra Richards

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 8 December 2023 in relation to the branding (website) and packaging of Grog Lemon Ice, Peach and Grape (“the products”) by Grog Drinks Pty Ltd (“the Company”), as well as website marketing for the products.
2. Alcohol marketing in Australia is subject to an amalgam of laws and codes of practice that regulate and guide the content and, to some extent, the placement of marketing. Given the mix of government and influences and requirements in place, it is accurate to describe the regime applying to alcohol marketing as quasi-regulation. The most important provisions applying to alcohol marketing are found in:
 - (a) Commonwealth and State laws:
 - Australian Consumer Law – which applies to the marketing of all products or services, and lays down baseline requirements, such as that marketing must not be deceptive or misleading;
 - legislation administered by the Australian Communications and Media Authority – which goes to the endorsement of industry codes that place restrictions on alcohol advertising on free to air television;
 - State liquor licensing laws – which regulate the retail and wholesale sale of alcohol, and contain some provisions dealing with alcohol marketing;

(b) Industry codes of practice:

- AANA Code of Ethics – which provides a generic code of good marketing practice for most products and services, including alcohol;
 - ABAC Responsible Alcohol Marketing Code (“ABAC Code”) – which is an alcohol-specific code of good marketing practice;
 - certain broadcast codes, notably the Commercial Television Industry Code of Practice – which restricts when advertisements for alcohol beverages may be broadcast;
 - Outdoor Media Association Code of Ethics and Policies – which place restrictions on the location of alcohol advertisements on outdoor sites such as billboards.
3. The codes go either to the issue of the placement of alcohol marketing, the content of alcohol marketing or deal with both matters. The ABAC deals with both the placement of marketing i.e. where the marketing was located or the medium by which it was accessed and the content of the marketing irrespective of where the marketing was placed. The ABAC scheme requires alcohol beverage marketers to comply with placement requirements in other codes as well as meet the standards contained in the ABAC.
4. For ease of public access, Ad Standards provides a common entry point for alcohol marketing complaints. Upon a complaint being received by the Ad Standards, a copy of the complaint is supplied to the Chief Adjudicator of the ABAC.
5. The complaint is independently assessed by the Chief Adjudicator and Ad Standards and streamed into the complaint process that matches the nature of the issues raised in the complaint. On some occasions, a single complaint may lead to decisions by both the Ad Standards Community Panel under the AANA Code of Ethics and the ABAC Panel under the ABAC if issues under both Codes are raised.
6. The complaint raises concerns under the ABAC Code and accordingly is within the Panel’s jurisdiction.

The Complaint Timeline

7. The complaint was received on 8 December 2023.
8. Generally, the Panel endeavours to make a decision within 30 business days of the receipt of a complaint but this timeline is not applicable due to the two-

part process involved in determinations concerning product names and packaging.

Pre-vetting Clearance

9. The quasi-regulatory system for alcohol beverage marketing features an independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was obtained for the packaging of Grog Grape and Peach (Approval Number 6367).

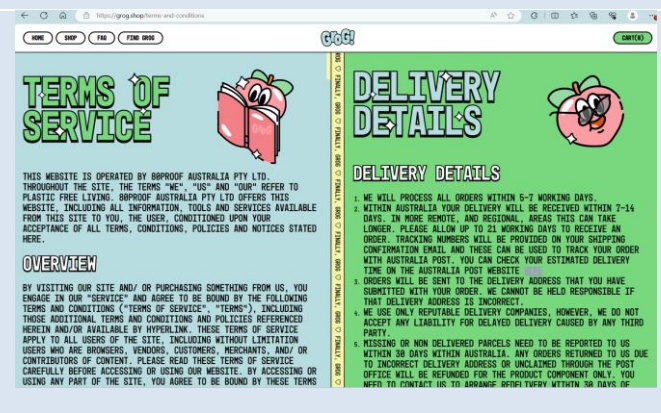
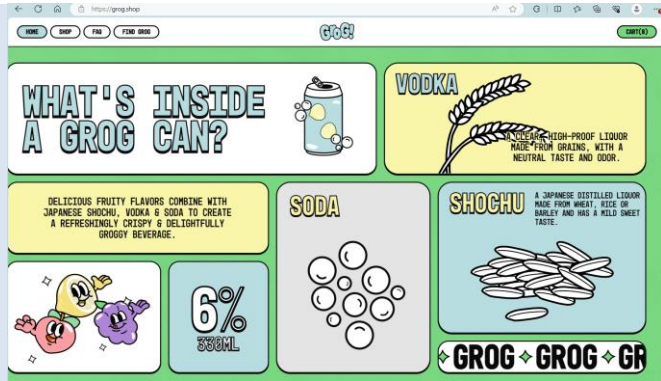
The Marketing

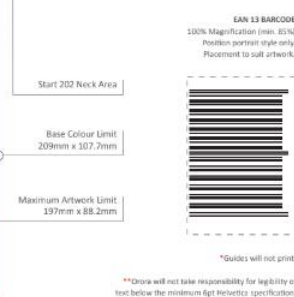
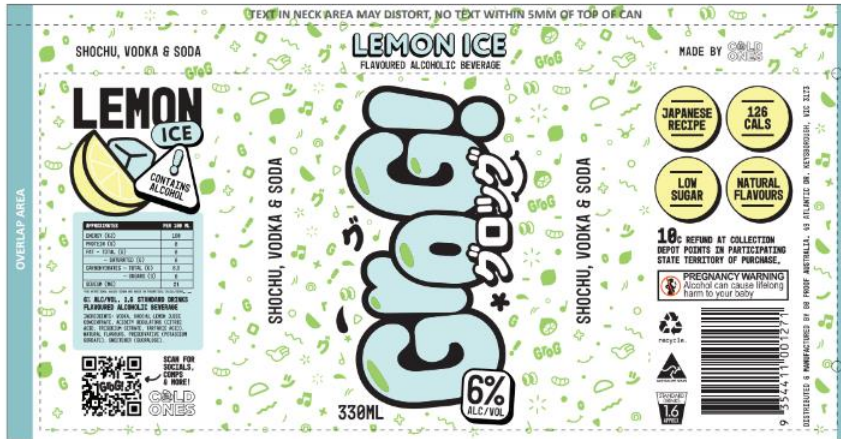
10. The complaint goes to the Company's website and the packaging (can design) of the product.

Website

The following screenshots have been taken from the website:







ORORA CONTACT Andrew Morwood
 ARTWORK CREATION DATE 01/01/20
 CLIENT Client Name
 CLIENT ITEM CODE XXXX
 ORORA CODE Orora Code
 JOB NAME File Name 330ml
 TEMPLATE 330ml_202
 ENQ 0000 REVISION 1
 DATE LAST AMENDED 01/01/20
 BY ARTWORKER D. Inuzuen - A. Follador
 SUPERSEDES CODE 0000
 AFFECTED PLANTS RK - RV

JOB HISTORY
 V1 - Prepare file for print.

COLOUR

 Neutral Black C	 White PMS 628 C	
 PMS 113 C	 HEX Red	 Colour PMS

VARNISH
 MATTE
 Aluminium Substrate

CUSTOMER APPROVAL

NAME

DATE SIGNED:

SIGNATURE:

The customer understands and accepts:
 (1) This contract is a legal document and is subject to the terms and conditions of the contract and printed matter and this contract shall be subject to the law of the United Kingdom.
 (2) The responsibility will be accepted by Orora Limited, including the need for copyright and with statutory requirements, for content of any printed matter submitted to the customer or for any error in printing, after the proof is signed and accepted by the customer.
 (3) The customer agrees to indemnify Orora Limited for any loss or damage incurred by Orora Limited in connection with the printing of this contract.



Complaint

11. The complainant objects to the marketing as follows:

- *The packaging and branding (website) is very much in the Japanese anime/manga style. It is clearly appealing to children.*

The ABAC Code

12. Part 3 (b) of the Code provides that a Marketing Communication must NOT:

- (i) have Strong or Evident Appeal to Minors, in particular;
 - (A) specifically target Minors;
 - (B) have a particular attractiveness for a Minor beyond the general attractiveness it has for an Adult;
 - (C) use imagery, designs, motifs, language, activities, interactive games, animations or cartoon characters that are likely to appeal strongly to Minors;
 - (D) create confusion with confectionery, soft drinks or other similar products, such that the marketing communication is likely to appeal strongly to Minors; or
 - (E) use brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

The Company Response

13. The Company's legal advisors responded to the complaint by letter emailed on 18 December 2023. The principal comments made were:

1 Background

- (a) We act for Grog Drinks Pty Ltd (Grog).
- (b) We refer to your letter dated 11 December 2023 to 80Proof Australia Pty Limited (80Proof) regarding ABAC Complaint 195/23 (Letter).
- (c) Grog is the owner and advertiser of the 'Grog Lemon Ice', 'Grog Peach' and 'Grog Grape' alcoholic beverages (Product).
- (d) While Grog outsources the manufacturing and distribution of the Product to 80Proof, Grog and 80Proof are separate entities. Grog and the Product are unrelated to 80Proof's products and advertising.

- (e) The product is created by an Australian podcaster and YouTuber duo (who are 27 and 30 years old), Cold Ones, whose audience is primarily adults aged between 18 to 34 years old.

2 Alcohol Advertising Pre-vetting Service Approval

- (a) Grog submitted the packaging for the grape and peach variants of the Product to ABAC's pre-vetting service on 30 June 2023 and received approval on 4 July 2023. The packaging submitted in the application and ABAC's final approval are attached as Annexure A.
- (b) While the lemon variant was not submitted for pre-vetting, other than the flavour variant and colour scheme, the packaging is identical to the packaging of the peach and grape variants.
- (c) Based on ABAC's approval, Grog proceeded with the mass manufacturing of the products for sale.
- (d) The Website reflects the imagery and themes depicted on the approved Product packaging.

3 Product and website launch date

- (a) The product was first available for sale on 29 August 2023.
- (b) The website <https://grog.shop/> (Website) was also launched on 29 August 2023.

4 'Strong or Evident Appeal to Minors'

4.1 ABAC Responsible Marketing Code

- (a) As raised in paragraph 2, the product packaging for the peach and grape variants were approved through ABAC's pre-vetting service.
- (b) While the updated ABAC Responsible Marketing Code (Code) came into effect on 1 August 2023, the previous version of the Code still prohibited alcohol marketing communications from having a 'Strong or Evident Appeal to Minors' under Part 3(b)(i). We understand the updated Code expands on Part 3(b)(i).
- (c) ABAC's approval of the packaging of the products based on the previous version of the Code indicates that it generally does not consider the packaging of the product to have a strong or evident appeal to minors.
- (d) As noted above, the Website replicates the themes and images in the product packaging that was approved by ABAC.

4.2 Japanese anime/manga

- (a) Anime is a style of animation originating from Japan. There are various genres of anime to cater for its wide audience which ranges from children, teenagers and adults. It is widely understood that the target audience of anime is not primarily or predominantly minors and there is a large adult audience that consumes anime.
- (b) Manga means Japanese comics or graphic novels which contains highly stylised art. Often, the content of manga is not intended for children and contains adult themes.
- (c) In this regard, it does not appear that the complainant is familiar with anime or manga. The complainant has made a broad assumption that all animations are 'clearly appealing' to children, which is incorrect and shows a lack of understanding of the art of anime and manga.

4.3 Clear and simple designs

- (a) It is unclear how a clear, uncluttered and simple design (as opposed to a fanciful design) is considered as playful, fun and engaging to minors rather than adults.
- (b) Many other alcohol brands have 'clear and simple' designs for their products and websites. For example, the packaging of seltzer products by Smirnoff, Good Tides and White Claw all have a white background with minimal designs and colours (often only colours to reflect the flavour variant), a minimalistic logo, and simple text.
- (c) The function of a website is generally to share information. Such information should be presented in a way that is accessible and legible. In this regard, it is not preferable for websites to be unclear, cluttered or incorporating complicated movements.
- (d) A clear and uncluttered design ensures that information about the product (such as it being an alcoholic beverage) is clearly communicated to the audience.

4.4 'Bubble' font and pastel colours

- (a) The colour of the font on the product packaging is not pastel. It is a standard orange and purple colour representing the flavour variants of the products, being peach and grape. The art files of the product packaging may cause the colours to look more pastel, however, when printed, it is not pastel. Photographs of the cans are attached as Annexure B for reference.

- (b) The font spells the word 'Grog', which is widely known and a used word for alcohol and therefore, a very prominent alcohol cue. We discuss this in further detail below.

4.5 Lack of alcohol cues

We note the comment in the letter that there may be 'an overall lack of alcohol cues that may lead to confusion with a soft drink'. This is incorrect on the following basis:

- (a) the brand name is 'Grog'. The word 'grog' is widely known to mean an alcoholic beverage, as recognised by many reputable dictionaries, such as Oxford, Cambridge and Merriam–Webster Collegiate Dictionary. It is also commonly used in Australia as a slang for the word alcohol. The brand 'Grog' is featured prominently on the product packaging and Website.
- (b) the front of the packaging clearly and prominently states that the product is a 'flavoured alcohol beverage' and contains '6% alc/vol'. The front of the packaging is also clearly and prominently depicted on the main page of the Website.
- (c) the side and back of the packaging also has the following cues:
 - i. multiple descriptions of the product being 'shochu, vodka & soda';
 - ii. 'contains alcohol' warning;
 - iii. 'real shochu' description;
 - iv. pregnancy warning label; and
 - v. standard drinks label.
- (d) we also note the name of the creators of the product, 'Cold Ones'. The logo of 'Cold Ones' includes an image of a glass of beer in place of the 'O' in 'Cold'. In Australia, the term 'cold ones' refers to a cold beer.

5 Actions taken by Grog

- (a) Grog took pre-emptive measures to ensure that the products complied with the Code by applying for ABAC's pre-vetting prior to proceeding with the official launch and sale of the products.
- (b) The Website and Grog's social media account (@drinkgrog on Instagram) are age gated. Customers must insert their year of birth

before entering the Website (similar to other alcohol companies). Users under the age of 18 cannot access Grog's Instagram profile.

- (c) Grog's bio on its Instagram account also reiterates that it is intended for an 18+ audience and includes a 'drink responsibly' messaging. Grog manually approves tags on its Instagram which allows it to moderate the content on its profile.
- (d) Grog's paid digital advertising is age restricted using Meta's tools and all organic advertising is through channels where the audience is predominantly adults. We are instructed that Grog's marketing does not appear in any channels that appeal to minors.
- (e) Further, Grog has completed ABAC's compliance checklists for paid and organic marketing, and is aware of ABAC's Best Practice for Responsible Digital Marketing.
- (f) The Website contains a warning of the penalties for underage drinking and a responsible consumption and supply of alcohol statement.
- (g) Excerpts from the Website and Grog's Instagram are attached as Annexure C.
- (h) Since receiving the letter and without admission of liability, Grog has made the following changes to the Website:
 - i. amended 'insanely yummy!' to 'full of flavour';
 - ii. replaced the 'finally, grog' banner with 'Grog 6% alcoholic Japanese soda', another alcohol cue (change may not be live yet);
 - iii. removed the faces from the fruits to reduce risk of being mistaken as characters from children's media; and
 - iv. included a more prominent responsible drinking messaging (change may not be live yet).

The Panel's View

Introduction

14. Grog products were first released in late August 2023, an initiative of podcaster and YouTuber duo Chad Roberts and Max Stanley, known as the Cold Ones. The Company has outsourced manufacture and distribution to 80Proof Australia Pty Limited. The products are described as being Ready to Drink (RTD) alcoholic beverages inspired by hard Japanese soda. They combine

Shochu, Vodka, and soda and are available in three flavours (Grape, Lemon Ice and Peach).

15. The complainant is concerned by the marketing of the product which it is argued is in a Japanese manga/anime style and as a result will have appeal to minors. Specifically, it is contended that both the Company's website and the product packaging (can design) will strongly appeal to children.
16. There is no doubt that both the website and product packaging design has been inspired by anime and given the nature of the product, the Company choosing to adopt branding of this type is not surprising. Anime is a form of animation that can trace its history in Japan to 1910s. Its popularity beyond Japan and in countries such as Australia is more recent but certainly the animation form was well recognised and gaining popularity by the 1980s.
17. Anime has a number of distinct genres and as noted by the Company, it is by no means solely or even primarily directed towards children. Accordingly, simply because an alcohol marketing item uses or is reminiscent of anime, it does not automatically follow that the marketing item will have strong appeal to minors. That said, there are styles of anime and storylines that are directed towards children and adolescents. Like all marketing assessed by the Panel, the Company's website and product packaging must be considered against the relevant Code standard on its own merits.

The ABAC Content Standards – Strong or Evident Appeal to Minors

18. The complainant's concerns raise Part 3 (b)(i) of the Code, which requires that an alcohol marketing communication must not have strong or evident appeal to minors. This might occur if the marketing:
 - specifically targets minors;
 - has a particular attractiveness for a minor beyond the general attractiveness it has for an adult;
 - uses imagery, designs, motifs, language, activities, interactive games, animations, or cartoon characters that are likely to appeal strongly to minors; or
 - creates confusion with confectionery, soft drinks or similar products, such that the marketing communication is likely to appeal strongly to minors.
19. The benchmark applied when assessing if an ABAC standard has been satisfied is the 'reasonable person' test. This means the Panel puts itself in the shoes of a person who has the life experiences, opinions and values commonly held by most Australians, and assesses how this reasonable person would

probably understand the marketing communication. Often a marketing communication could be understood in several ways. The reasonable person benchmark requires that the most likely interpretation be preferred over a possible but less probable interpretation.

20. The Panel has considered the Part 3 (b) standard on many past occasions. While each marketing communication must always be assessed individually, some characteristics within marketing material which may make it strongly appealing to minors include:
- the use of bright, playful, and contrasting colours;
 - aspirational themes that appeal to minors wishing to feel older or fit into an older group;
 - the illusion of a smooth transition from non-alcoholic to alcoholic beverages;
 - creation of a relatable environment by use of images and surroundings commonly frequented by minors;
 - depiction of activities or products typically undertaken or used by minors;
 - language and methods of expression used more by minors than adults;
 - inclusion of popular personalities of evident appeal to minors at the time of the marketing (personalities popular to the youth of previous generations will generally not have strong current appeal to minors);
 - style of humour relating to the stage of life of a minor (as opposed to humour more probably appealing to adults); and
 - use of a music genre and artists featuring in youth culture.
21. It should be noted that only some of these characteristics are likely to be present in a specific marketing communication and the presence of one or even more of the characteristics does not necessarily mean that the marketing item will have strong or evident appeal to minors. It is the overall impact of the marketing communication rather than an individual element that shapes how a reasonable person will understand the item.

The website

22. The website provides information about each product in the range and facilitates the ordering of the products. The site uses an active and engaging style. It employs cute, anthropomorphised characters for each product i.e. a lemon, grape and peach which are shown walking, waving and smiling. The

backdrop for each product is a moving swirl pattern in the colour of the font used on the respective three products.

23. The Company contends that the website does not have strong or evident appeal to minors submitting the site:
 - replicates the themes and images in the product packaging that was approved at pre-vetting;
 - uses a clear and uncluttered design, ensuring that information about the product (such as it being an alcoholic beverage) is clearly communicated to the audience; and
 - is age gated.
24. It should be noted that the ABAC consists of both Content standards and Placement standards. The aim of the Placement standards is to direct alcohol marketing to adults and to the extent reasonably possible, away from minors. Compliance with the Placement standards however is not a defence from a breach of the Content standards. The content of alcohol marketing must not have strong or evident appeal to minors irrespective that the various placement protections have limited or at best excluded minors from viewing the marketing communication.
25. Following the complaint, the Company has made a number of changes to the website (without conceding a breach of the Code). While the changes listed below reflect the current position with the website, the Panel is to assess the site as at the time of the complaint. The changes advised by the Company have been:
 - amended 'insanely yummy!' to 'full of flavour';
 - replaced the 'finally, grog' banner with 'Grog 6% alcoholic Japanese soda', another alcohol cue (change may not be live yet);
 - removed the faces from the fruits to reduce risk of being mistaken as characters from children's media; and
 - included a more prominent responsible drinking messaging (change may not be live yet).
26. The Panel believes that the website referred to in the complaint breaches the Part 3 (b)(i) standard due to:
 - having an overall design which would be considered playful, fun and engaging to minors rather than mature with a clearly adult focus;

- the cute and amorphous drawings of fruit, which in some instances are walking and/or waving, in a cartoon style that are reminiscent of characters from children's media;
- the use of cartoonish font and swirling block colours, which could be appealing to minors; and
- taken as a whole, a reasonable person would probably understand the website as having evident appeal to minors beyond the general appeal it has to an adult.

27. The complaint is upheld in relation to the website breaching Part 3 (b)(i) of the Code.

The packaging

28. The packaging of each flavoured product adopts a uniform design with the main difference being that the predominant colour used varies depending on the flavour (i.e. purple for Grape, orange for Peach and blue for Lemon Ice). The packaging for each product:

- has a white background with light small images of stars and other shapes;
- is dominated by the word 'Grog!', written vertically up the front of the can, using 'bubble' font in the relevant colour;
- shows what appear to be Japanese style characters below the word 'Grog!';
- at the top of the front label shows the flavour in the relevant colour, beneath which are the words 'Flavoured Alcohol Beverage';
- shows the words 'Shochu, Vodka & Soda', in black font, vertically at the sides of the front of the can;
- at the bottom of the front, shows that it is 6% Alc/Vol, and has a 330ml capacity; and
- the rear of the can contains product information.

29. Product packaging can give rise to strong appeal to minors if it creates confusion with confectionery or a soft drink. Confusion with a soft drink might occur if:

- the packaging fails to clearly identify the product as an alcohol beverage through the use of an alcohol term like beer, ale, vodka, style of wine etc or reliance is made of more subtle alcohol references or terms

understood by regular adult drinkers but less likely to be understood by minors e.g. IPA, NEIPA;

- the packaging has a visual design that resembles a soft drink such as the display of fruit images, bright block colours and the use of a font style or iconography found typically on soft drinks or fruit juices;
- the use of terms commonly associated with a soft drink or fruit juice e.g. orange, lemon, blueberry, pop, smash etc; and
- the type of physical package used and whether this is similar to that used by soft drinks or fruit juices e.g. prima style juice box.

30. When assessing a design of a can or bottle, it cannot be expected that a reasonable person will turn the container around the full 360 degrees and study it in fine detail. Rather it is the front of the can/bottle that will be most influential in how the person will probably understand the packaging and impressions will be most strongly shaped by larger font writing and the predominant colours and design features.

31. The Company contends the packaging is consistent with the ABAC standard, arguing that:

- the anime style adopted, like anime more broadly, is not primarily or predominantly directed towards minors and there is a large adult audience that consumes anime;
- the brand name 'Grog' is widely known to mean an alcoholic beverage and is commonly used in Australia as a slang for the word alcohol;
- the front of the packaging clearly and prominently states that the product is a 'flavoured alcohol beverage' and contains '6% alc/vol';
- the side and back of the packaging also has the following cues:
 - multiple descriptions of the product being 'shochu, vodka & soda';
 - 'contains alcohol' warning;
 - 'real shochu' description;
 - pregnancy warning label; and
 - standard drinks label.

32. The Panel accepts that the packaging design does establish that the products are alcohol beverages and the design does not resemble well known soft drink staples. While the products have a distinctive style, a reasonable person would

not confuse the packaging as being for a soft drink. That said, the principal intent of the Part 3 (b) standard is not to avoid a minor mistaking the product as a soft drink but wanting to consume the product due to its packaging being strongly or evidently appealing to minors.

33. Compared to the website, the anime inspiration for the branding product packaging is less immediately apparent. The bubble style font employed for the 'Grog!' name is used in anime, but equally it is used in many contexts. For instance, the style might bring to mind graffiti art forms. The Japanese like characters provide the clearest indication of anime as a packaging design choice as well as being a cue as to the nature of the beverage.
34. Further, the packaging design is obviously static and it is the movement of features such as the amorphous fruit images which particularly makes the website potentially highly appealing to minors.
35. The Panel believes it is a finely balanced decision as to the probable appeal of the packaging to minors and it is likely that reasonable minds could disagree. On balance, the Panel finds that the packaging does not breach the Part 3 (b) (i) standard noting the following:
 - while the bubble style font might convey a childlike or playful tone, it does spell out the word 'Grog' which is colloquially used and recognised as a name for alcoholic drinks;
 - the can design establishes the product as being a shochu and vodka RTD and it is unlikely the product packaging would be confused with a soft drink;
 - the use of Japanese lettering would not likely have any strong appeal to minors;
 - taken as a whole, the packaging would probably be understood as having incidental rather than strong appeal to minors.
36. The complaint is upheld in regard to the website and dismissed in relation to the product packaging.